

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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CHRISTOPHER POLK,  
*individually, and on behalf of all others  
similarly situated,*

Plaintiff,

**Case No.: 1:21-cv-00129-PAE**

v.

DEL GATTO, INC.,

Defendant.

\_\_\_\_\_ X

**DECLARATION OF JOSHUA OPPERMAN**  
**REPRESENTATIVE OF DEL GATTO, INC. IN SUPPORT OF ITS MOTION TO**  
**DISMISS THE COMPLAINT**

JOSHUA OPPERMAN declares under penalty of perjury, pursuant to 28 U.S.C. § 1746,  
that the following is true and correct:

1. I am a representative of Del Gatto, Inc., the defendant (the “Defendant”) in the above-captioned matter.
2. I make this declaration in support of Defendant’s motion to dismiss Plaintiff’s complaint under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure.
3. I am the Chief Technical Officer and Marketplace President for I Do Now I Don’t, which is owned by Del Gatto, Inc., and as such I am familiar with the underlying facts and circumstances in this case.

### **Background of I Do Now I Don't**

4. In 2015, Christopher Del Gatto, former owner of SellJewelry.com merged with I Do Now I Don't ("IDNID"). When the companies merged, Del Gatto, Inc. was formed. Mr. Del Gatto is the Co-Founder, Chairman, and chief operating officer of Del Gatto, Inc.

5. IDNID is a luxury jewelry reseller that operates a website, <https://www.idonowidont.com/>, that allows sellers of jewelry to place items in an online marketplace for buyers to search and bid for items.

6. IDNID markets itself as "the leading online diamond & jewelry Marketplace where buyers can purchase items for more than 80% off retail prices and sellers can expect to receive the strongest possible pricing for their diamonds and jewelry."

7. To operate in the marketplace, each seller is required to create an account. Signing up for an account is free for all sellers. Each prospective seller is required to submit their email address, potential password, name, phone number, postal address, and state whether he or she is a buyer, seller, or both. Before an account can be created, the seller must accept the "Terms & Conditions of Use" and accept a "fraud alert."<sup>1</sup>

8. In pertinent part, the "Terms & Conditions of Use" provides:

- "Sellers Commission: from \$500 - \$5,000 = %20 of the sale price : \$5,001 - \$10,000 = %18 of the sale price : \$10,001 - \$50,000 = %15 of the sale price: \$50,000 + %10 of the sale price. VIP Service %25 of the sale price."
- "Payments for all direct purchases or marketplace sales are issued on the 15th of every month for any items that have sold and passed authentication from the first day to the last day of the month prior. For example, all payments issued on February 15th would cover any items sold and passed during January 1st - January 31st. All payments will be sent by check via USPS. For Marketplace sales, the payment timeline begins once the item is received in-house and

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<sup>1</sup> "alert: for your own protection please do not give out your personal email address or phone number to anyone. we view and monitor all messages. if you disregard this and provide any of your personal information, you will be banned from the site immediately. please note, any items sold would only be shipped to our corporate headquarters at 15 west 47th street suite 1000 new york, ny 10036. you would never ship your item anywhere else."

authenticated. For Direct Offers and VIP sales, the payment timeline begins once the Purchase Form has been signed.”

- “you hereby **release** DELGATTO/IDNID, its officers, employees, agents and successors in rights from claims, demands and damages (actual and consequential) of every kind or nature, including death, known or unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way related to such disputes and/or the DELGATTO/IDNID Service.
- “IDNID EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, RELATING TO THE OPERATION OR YOUR USE OF THE IDNID WEBSITE, INCLUDING, WITHOUT LIMITATION”

9. Once a seller creates an account and agrees to the “Terms and Conditions of Use” the seller may list items on the marketplace for thirty (30) days. If the item is not sold within thirty (30) days, the seller has the option to renew the listing.

10. Buyers may contact sellers through the marketplace to either ask questions about the item or place an offer on the item for sale.

11. If the buyer’s offer is accepted, the seller will be asked to ship the item to Del Gatto for authentication. Del Gatto will email the seller a shipping label upon request.

12. Once Del Gatto receives the item, the buyer will receive an email that the item was received by Del Gatto. The item is then sent to an independent expert gemologist. The authentication process is performed by independent gemologists in and around the New York City region, who in turn create an independent appraisal report attesting to the authenticity of the item. When the item is authenticated a second email will be sent to the buyer confirming or denying the authentication of the item.

13. Sellers are informed that payment “for all direct purchases or marketplace sales will be issued on the 15<sup>th</sup> of every month for any items that have sold from the first day of the last day of the prior month.”

### **Impact of COVID-19 on IDNID Operations**

14. On or about March 20, 2020, Governor Andrew Cuomo of New York State, executed an emergency Executive Order 202.6, also known as “New York PAUSE” that shut down all non-essential business in New York.

15. Similarly, on March 25, 2020, New York City Mayor Bill de Blasio extended and reaffirmed the emergency executive order to all business within New York City, including that all non-essential businesses reduce their in-person workforce by 100%. See Emergency Executive Order No. 103.

16. At that time, the smooth operation of Del Gatto and the IDNID service was fully dependent upon our physical offices located at 16 East 52<sup>nd</sup> Street, New York, NY 10022.

17. Our office operations were subject to the relevant New York State and City executive orders issued by Governor Cuomo and Mayor de Blasio.

18. Pursuant to the relevant executive orders in place at that time, jewelry appraisal, selling, and purchasing jewelry were not considered essential businesses. Therefore, the office operations of Del Gatto essentially came to a stop.

19. Employees of Del Gatto were forced to transition to remote work practically overnight and without training. Further, many functions of the office including processing items, sending items to gemologists, receiving items, and writing checks required employees to be in the office and were not able to be performed during this period.

20. Del Gatto’s business model also depends on the functionality of other businesses including third-party gemologists and the United Parcel Service (“UPS”). As gemologists were also not considered “essential” it was difficult and greatly extended the time required to obtain appraisals for items obtained prior to and after March 20, 2020. Similarly, all shipping services

suffered significant and substantial delays during Spring and Summer 2020 because of the pandemic.

21. Del Gatto adapted to these circumstances to the best of its ability. Del Gatto began having items sent to employees' homes for processing and those employees then shipped the items to third party authenticators at their homes. Also, as the staff was processing payments and working remoting vetting transactions, an officer of the organization was required to go into the New York City Office and hand write and sign checks to sellers. While this was an improvement, these events substantially impacted the timeline for submission, authentication verification, and payment processing.

22. For the period after March 20, 2020, Del Gatto still had to process and pay sellers whose items sold before the Executive Order was instituted. As new items were sold and needed to be processed, these items were added to a backlog of other items that still needed to be processed.

23. New York City did not enter into Phase 1 of the New York State's Reopening Plan allowing non-essential businesses to open at reduced capacity until June 8, 2020.<sup>2</sup> Therefore, a limited number of employees of Del Gatto did not return to the office to resume operations until June 8<sup>th</sup>.

24. Despite the ability of employees to enter to office, there remained a backlog of work to perform and authenticators and shipping services were not operating at pre-pandemic levels.

25. However, Del Gatto continues to process, authenticate, and provide payment to sellers to this day.

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<sup>2</sup> <https://www.governor.ny.gov/news/new-york-city-enters-phase-one-reopening-today-governor-cuomo-announces-new-york-city-now> (last accessed February 22, 2021).

**CHRISTOPHER POLK**

26. On or about January 9, 2020, Plaintiff, Christopher Polk signed up for an account on the IDNID website.

27. That same day, Plaintiff listed an item on the marketplace for \$4,000.

28. The item Plaintiff listed for sale did not sell within the thirty (30) time frame and thus, Plaintiff was required to renew his listing in the marketplace. Plaintiff renewed his listing for a total of six (6) times.

29. On or about June 11, 2020, Del Gatto informed Plaintiff that a buyer in the marketplace purchased Plaintiff's item for its listed price of \$4,000.

30. Five days after receiving notice of the sale, Polk requested a shipping label from Del Gatto to send the item for inspection and appraisal.

31. Del Gatto informed Polk via email that his item was received on or about June 22, 2020. The email is attached hereto as **Exhibit 1**.

32. The email states, "For sellers, all checks for Marketplace sales are issued on the 15<sup>th</sup> of every month for any items that have sold and passed authentication from the first day to the last day of the month prior. For example, all payments issued on February 15<sup>th</sup> would cover any items that sold **and passed authentication** during January 1<sup>st</sup>- January 31<sup>st</sup>." **Exhibit A** (emphasis added).

33. On or about July 6, 2020, Polk sent an additional email to [customercare@idonowidont.com](mailto:customercare@idonowidont.com) asking for an updated on his item. He further asked "Should I be expecting a check to come out to me on the 15<sup>th</sup> of this month?" See **Exhibit A**.

34. Minutes after receiving Polk's email, [customercare@idonowidont.com](mailto:customercare@idonowidont.com) responded to Polk's request and informed him that authentication was delayed due to COVID-19. See

**Exhibit A.**

35. On July 15, 2020, Polk sent another email to [customercare@idonowidont.com](mailto:customercare@idonowidont.com) asking to see whether the authentication was complete. Polk further stated that "...today is the 15<sup>th</sup> and I was expecting a check this month, not after the 15<sup>th</sup> of the next!" **Exhibit A.**

36. Polk failed to comprehend that policies of IDNID for a second time, after being informed that Polk would not receive payment until the items were sold and authenticated.

37. On or about July 16, 2020, [customercare@idonowidont.com](mailto:customercare@idonowidont.com), responded to Polk's email, informing him that his item did pass inspection and he would receive a confirmation email. **Exhibit A.**

38. Given the ongoing delays due to the pandemic, the buyer did not receive the item until at least mid-July, 2020.

39. Polk was tendered the full amount due and owing via check received by Polk on February 5, 2021.

40. The pandemic has made it impossible to operate at normal capacity and the impacts of the government mandated shut-down orders continue to significantly impact Del Gatto's business to this day.

I declare under penalty of perjury the foregoing is true and correct.

Dated: New York, New York  
February 24, 2021



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JOSHUA OPPERMAN